ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In The Matter of	)	
APPLICATION OF GTE CORPORATION AND BELL ATLANTIC CORPORATION FOR TRANSFER OF CONTROL OF GTE CORPORATION TO BELL ATLANTIC CORPORATION	)	CC Docket No. 98-184

COMMENTS OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

TELECOMMUNICATIONS
RESELLERS ASSOCIATION

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SUMMARY

The Telecommunications Resellers Association, a national trade association representing more than 750 entities engaged in, or providing products and services in support of, telecommunications resale, hereby submits the following comments addressing the pending application for authority to transfer control of GTE Corporation to Bell Atlantic Corporation. The instant Application reflects yet another in a wave of consolidation among large incumbent local exchange carriers, Bell Atlantic having previously acquired NYNEX, and SBC having previously acquired PacTel and SNET. While the Commission sanctioned the SBC/PacTel, SBC/SNET and Bell Atlantic/NYNEX mergers, it has done so with increasing reluctance, recognizing the substantial competitive harms that are likely to be generated by combinations among near-monopoly incumbent providers of local exchange and exchange access services.

TRA urges the Commission to scrutinize the proposed GTE/Bell Atlantic merger (which will combine what are now the largest and the third largest of the nation's incumbent LECs into the nation's largest telecommunications service provider) even more closely than the earlier combinations. The more and larger the combinations of incumbent LECs, the greater the threat to nascent local exchange competition and ultimately to competition in the interexchange and other markets. Certainly, the Commission should require commitments no less compelling, and indeed, should impose conditions substantially more demanding, than those extracted from Bell Atlantic and NYNEX to mitigate the negative impacts of that merger on competition before contemplating approval of the GTE/Bell Atlantic combination. Given the magnitude of the resulting entity, however, such commitments may not be adequate to counter-balance the competitive damage that

the merger will likely produce, leaving the Commission with no choice but to deny the authority sought by GTE and Bell Atlantic here.

TRA urges the Commission to be realistic in its approach not only to the instant merger, but to the proposed SBC/Ameritech combination as well. If the Commission sanctions the merger of GTE and Bell Atlantic, as well as the merger of SBC and Ameritech, it will be exceedingly difficult, if not impossible, for it to say no to other combinations no matter how large the resultant entity. As it is, a combined GTE/Bell Atlantic, in conjunction with a combined SBC/PacTel/SNET/Ameritech, would control more than 75 percent of the access lines across the nation. TRA submits that Congress did not enact the Telecommunications Act of 1996 merely to change the meaning of "RBOC" to "remaining Bell Operating Company."

At some point the Commission must simply draw the line and refuse to permit any further combinations of large incumbent LECs until such time as they have ceased to be the dominant providers in their respective markets. Given the continuing refusal of incumbent LECs, including GTE and Bell Atlantic, to fully open their respective local markets to competitive entry, that time is probably now. The Commission cannot, and should not, sit idly by as resistant monopolists fortify their monopoly bastions against competitive intrusion.

Short of outright denial, TRA recommends that the Commission up the ante by converting mere post-merger commitments into pre-merger conditions. In other words, let actions rather than words be the driving force. Require GTE and Bell Atlantic to implement the various commitments enumerated in Appendices C and D to the *Bell Atlantic/NYNEX Merger Order*, as well as the further conditions imposed here, before permitting them to consummate the proposed transaction.

In this respect, TRA recommends that the Commission revisit several conditions it rejected in the *Bell Atlantic/NYNEX Merger Order*. Among other things, TRA urges the Commission to identify full "checklist compliance" as a condition to merger approval and to condition such approval on the implementation of measures designed to facilitate the growth of local competition, including increased wholesale discounts, enhanced colocation opportunities and the availability of preassembled combinations of unbundled network elements.

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COMMENTS OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

The Telecommunications Resellers Association ("TRA"),[1] through undersigned counsel and pursuant to Public Notice, DA 98-2035 (released October 8, 1998), hereby submits the following comments addressing the application ("Application") of GTE Corporation ("GTE") and Bell Atlantic Corporation ("Bell Atlantic") (collectively, the "Applicants") for authority to transfer control of GTE to Bell Atlantic as part of a proposed transaction pursuant to which GTE would become a wholly-owned subsidiary of Bell Atlantic. The instant Application reflects yet another in a wave of consolidation among large incumbent local exchange carriers ("LECs"), Bell Atlantic

[1] A national trade association, TRA represents more than 750 entities engaged in, or providing products and services in support of, telecommunications resale. TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services. TRA is the largest association of competitive carriers in the United States, numbering among its members not only the large majority of providers of domestic interexchange and international services, but the majority of competitive local exchange carriers as well.

having previously acquired NYNEX Corp. ("NYNEX"),[2] and SBC Communications, Inc. ("SBC") having previously acquired Pacific Telesis Group ("PacTel")[3] and Southern New England Telephone Company ("SNET").[4] While the Commission sanctioned the SBC/PacTel, SBC/SNET and Bell Atlantic/NYNEX mergers, it has done so with increasing reluctance, recognizing the substantial competitive harms that are likely to be generated by combinations among near-monopoly incumbent providers of local exchange and exchange access services.

TRA urges the Commission to scrutinize the proposed GTE/Bell Atlantic merger (which will combine what are now the largest and the third largest of the nation's incumbent LECs into the nation's largest telecommunications service provider)[5] even more closely than the earlier combinations. The more and larger the combinations of incumbent LECs, the greater the threat to nascent local exchange competition and ultimately to competition in the interexchange and other markets. Certainly, the Commission should require commitments no less compelling, and indeed, should impose conditions substantially more demanding, than those extracted from Bell Atlantic and

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[2] Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries (Memorandum Opinion and Order), 12 FCC Rcd. 19985 (1997).

[3] Applications of Pacific Telesis Group, Transferor, and SBC Communications, Inc., Transferee, for Consent to Transfer Control of Pacific Telesis Group and Its Subsidiaries (Memorandum Opinion and Order), 12 FCC Rcd. 2624 (1997).

[4] Applications for Consent to the Transfer of Control of Licences and Section 214 Authorizations from Southern New England Telephone Corporation, Transferor, to SBC Communications, Inc., Transferee (Memorandum Opinion and Order), CC Docket No. 98-25, FCC 98-276 (Oct. 23, 1998).

[5] Federal Communications Commission, Preliminary Statistics of Communications Common Carriers, 1997 Edition, Table 1.1. The combination of SBC/ PacTel/SNET with Ameritech would produce an entity 25 percent smaller than the combined GTE/Bell Atlantic.

NYNEX to mitigate the negative impacts of that merger on competition before contemplating approval of the GTE/Bell Atlantic combination. Given the magnitude of the resulting entity, however, such commitments may not be adequate to counter-balance the competitive damage that the merger will likely produce, leaving the Commission with no choice but to deny the authority sought by GTE and Bell Atlantic here.

TRA urges the Commission to be realistic in its approach not only to the instant merger, but to the proposed SBC/Ameritech combination as well. If the Commission sanctions the merger of GTE and Bell Atlantic, as well as the merger of SBC and Ameritech, it will be exceedingly difficult, if not impossible, for it to say no to other combinations no matter how large the resultant entity. As it is, a combined GTE/Bell Atlantic, in conjunction with a combined SBC/PacTel/SNET/Ameritech, would control more than 75 percent of the access lines across the nation.[6] TRA submits that Congress did not enact the Telecommunications Act of 1996 merely to change the meaning of "RBOC" to "remaining Bell Operating Company."

I. The Standard

In approving the Bell Atlantic/NYNEX merger, the Commission made clear that the merger proponents bore the burden of demonstrating that the proposed combination would further the public interest, convenience and necessity, and emphasized that any such demonstration must include a showing that the proposed merger would "enhance and promote, rather than eliminate or retard, competition."[7] Applicants proposing a merger which eliminates "potentially significant

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[6] Federal Communications Commission, Preliminary Statistics of Communications Common Carriers, 1997 Edition, Table 1.1.

[7] Id. at ¶¶ 2 - 3.

sources of the competition that the Communications Act [of 1934 ("Communications Act")], particularly as amended by the Telecommunications Act [of 1996 ("Telecommunications Act")]," sought to create, the Commission declared , would need to demonstrate that the facial "harms to competition . . . are outweighed by benefits that enhance competition."[8] And this is particularly true when the proposed combination was "between incumbent monopoly providers and possible rivals during . . . [the] initial period of implementation of the . . . [Telecommunications] Act."[9] Moreover, the Commission continued, merger proponents would have to demonstrate that competition would be enhanced both during and after implementation of the Telecommunications Act, taking into account the competitive impacts of the proposed combination following entry by the Bell Operating Companies into the in-region, interLATA market.

As the Commission has noted, the Communications Act "permits the Commission to impose [on a proposed merger of incumbent LECs] such conditions as are necessary to serve the public interest."[10] Thus, Section 214(c) of the Communication Act expressly empowers the Commission to attach to any approval "such terms and conditions as in its judgment the public convenience and necessity may require."[11] Properly construing "the Title II public convenience and necessity standard . . . 'to secure for the public the broad aims of the Communications Act'," the Commission has emphasized that "the public interest standard necessarily encompasses the goals

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8 Id.

9 Id. at ¶ 4.

10 Id. at ¶ 29.

11 47 U.S.C. § 214(c).

of promoting competition and deregulation."[12] As such, "[t]he [Communications Act] public interest standard, and the competitive analysis conducted thereunder, are necessarily broader than the standard applied to ascertain violations of the antitrust laws," allowing for consideration of "trends within and needs of the industry, the factors that influenced Congress to enact specific provisions for a particular industry, and the complexity and rapidity of change in the industry."[13]

Applying these standards in the context of the Bell Atlantic/NYNEX merger, the Commission cited as a potential harm to competition sufficient unto itself to warrant denial of the proposed combination the elimination of not only a likely independent significant competitive provider within both the Bell Atlantic and NYNEX service areas of "local exchange and exchange access services, and unbundled local exchange, exchange access and long distance services," but an independent entity "possess[ed of] significant assets and capabilities that otherwise would enable it to compete with NYNEX [or Bell Atlantic, as applicable]."[14] Exacerbating the loss of a key source of competitive pressure, the Commission noted further concern, the proposed combination "would by its own terms increase the likelihood of coordinated action among . . . remaining . . . market participants to increase prices, reduce quality or restrict output."[15] Thus, the Commission concluded that, without more, the potential harms to competition that would result from the Bell Atlantic/NYNEX merger outweighed the benefits that would purportedly flow from the combination.

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12 Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries (Memorandum Opinion and Order), 12 FCC Rcd. 19985 at ¶ 31.

13 Id. at ¶ 32.

14 Id. at ¶¶ 8 - 12.

15 Id. at ¶ 11.

It was only because the merger proponents committed to a series of pro-competitive conditions that approval of the combination was possible and even then, the Commission remarked, the matter "remain[ed] a close case."[16]

Consistent with this assessment, the Commission emphasized that pro-competitive commitments would not necessarily carry the day in other contexts:

> Granting this application subject to conditions does not mean applicants will always be able to propose pro-competitive public interest commitments than will offset potential harm to competition. Nor would these particular conditions necessarily justify approval of another proposed merger for which applicants had not otherwise carried their burden of proof. . . . As competitive concerns increase, it becomes significantly more difficult for applicants to carry their burden to show that the proposed transaction is in the public interest.[17]

Moreover, the Commission noted its concern that additional mergers involving large incumbent LECs could hinder its ability to "carry out properly its responsibilities to ensure just and reasonable rates, to constrain market power in the absence of competition, and to ensure the fair development of competition that can lead to deregulation," allowing greater opportunities for coordinated action among incumbents and depriving regulators of meaningful cross-carrier performance comparisons.[18]

II. Applying the Standard

In their application, GTE and Bell Atlantic assure the Commission that their combination "does not present a cognizable problem of lost potential competition because it does

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16 Id. at ¶ 12.

17 Id. at ¶ 15.

18 Id. at ¶ 16.

not deprive any local-service market of a substantial competitive force unavailable from other firms."[19] The Applicants predicate this belief upon the following assertions: (i) "Bell Atlantic today is not a significant potential competitor to any of the other Bell companies;" (ii) "[Bell Atlantic's] service areas are geographically separated from the major service areas of the other Bells;" and (iii) "[Bell Atlantic] lacks the presence that its needs effectively to enter and compete in the key urban markets of the other Bells' regions."[20] And as to GTE, the Applicants opine that "[t]here is no reason to think that GTE would be a significant entrant into Bell Atlantic's current local-service markets . . . [because it] has no special advantages over other CLECs."[21] The Applicants' claims in this respect are undercut not only by the words and actions of other large incumbent LECs, but their own arguments.

In attempting to sell their merger, SBC and Ameritech have committed upon consummation thereof to "immediately begin to implement . . . [an] aggressive National-Local Strategy to offer competitive local exchange, long distance and other telecommunications services to businesses and residences in the 30 largest U.S. local markets outside . . . [of the combined entity's] incumbent service area."[22] According to SBC and Ameritech, "[t]he list of service areas in

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[19] Application for Transfer of Control at Exh. A (Public Interest Statement), 25 - 26.

[20] Id. at Exh. A (Public Interest Statement), 1.

[21] Id. at Exh. A (Public Interest Statement), 29.

[22] Application of Ameritech Corporation and SBC Communications, Inc. for Authority to Transfer Control of Ameritech Corporation to SBC Communications, Inc. filed in CC Docket No. 98-141 at Description of the Transaction, Public Interest Showing and Related Demonstrations (July 24, 1998).

which the new SBC will provide local exchange service includes those currently served by *Bell Atlantic*, BellSouth, US West and *GTE*, among other ILECs."[23]

As portrayed by SBC, neither it nor Ameritech has any choice but to pursue such a strategy:

> As our customers expand, both domestically and internationally, and begin to focus on securing all or substantially all of their telecommunications services from a single source, we could either stand pat and run the risk of losing our large and mid-size customers, who though small in number represent a very large portion of our revenues, or we could expand and compete for the opportunity to follow and serve our customers wherever they might be.
>
> SBC and Ameritech believe that, absent such a widespread, simultaneous, facilities-based, out-or-region and global entry, they will not be able to compete effectively with the other major companies that can now provide a full range of telecommunications services to the large and mid-size business customers located in SBC's and Ameritech's in-region areas. Frankly, SBC and Ameritech have found that, if they remain confined to their regions and engage in only incremental out-of-region expansion, they will be able to compete less effectively for the large and mid-size business customers that are looking to have all (or substantially all) of their service needs met by a single carrier.[24]

Moreover, SBC is cognizant that it must enter major out-of-region markets "quickly:"

> SBC believes that it is critical to do so in order to serve the needs of the large and mid-size business customers that will form the base or 'anchor' for this entry and establish 'first mover' advantages.[25]

In other words, each of SBC and Ameritech have come to the conclusion that they must enter as competitors the local service markets served as incumbents by other BOCs and

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[23] Id. at 13 (emphasis added).

[24] Id. at 3 - 4, 6.

[25] Id. at 13.

incumbent LECs, including GTE and Bell Atlantic. In this assessment, they are joined by various industry analysts. As one article noted a year ago:

> The baby Bells might not be the sleeping giants we assumed. They seem to be wide awake and working behind the scenes to break into . . . [one another's] markets . . . The fiercest competition is taking shape in Texas, where GTE and SBC each provide service to different areas of the state as incumbent local carriers. The two already are competing for customers in southern California.[26]

As an industry commentator explains:

> We believe that Regional Bell Operating Companies (RBOCs) will be in a position to drop the "regional" moniker over the next two years as competitive forces dictate geographic expansion.
>
> We believe . . . [the RBOCs] will soon start attacking outside their local service regions to exploit the same "cream skimming" opportunity that has made their future earnings growth so vulnerable.
>
> . . . We expect SBC Communications to break the RBOC nonaggression pact before it completes the Ameritech merger to show regulators it's serious about its out-of-region competitive local exchange carrier (CLEC) strategy. We believe that this will create a domino effect, as other RBOCs will most likely be forced to respond.
>
> We expect to see RBOCs buy CLECs outside of their regions in addition to building their own infrastructure and sales organizations.[27]

GTE certainly concurred with this assessment. Thus, in its 1996 Annual Report, GTE's Chairman Charles R. Lee declared in his "Chairman's Message:"

> Our combined wireline and wireless operations cover 29 states, encompassing about one-third of the U.S. population. . . . We're . . . well positioned to expand *successfully* into neighboring markets

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[26] Rockwell, M., "Big Telcos Start Turf Wars -- GTE and Bell Companies Invade Each Other's Territories," InternetWeek (Nov. 3, 1997).

[27] PaineWebber, Inc., Industry Report: Regional Bell Operating Companies/Telecom Industry (July 27, 1998).

> across the United States. In fact, almost 60% of the U.S. population lies within a 100-mile radius of our current franchise markets. So, enormous opportunities lie within easy reach of our existing operations.

A year later, GTE's President Kent B. Foster added in his description of "Domestic Operations in GTE's 1997 Annual Report:

> We formed GTE Communications Corporation -- which is our competitive local-exchange carrier, or CLEC. It will be able to market the full spectrum of GTE Services, including local, long-distance, wireless and data services, without regard to franchise boundaries. This unit will allow us to compete on a level playing field with other companies entering our markets as CLECs, and will help us become a national provider of telecommunications and data services. At year-end 1997, this group was aggressively marketing a full array of bundled services in California and Florida, with plans to market in additional states by year-end 1998.

As is apparent, market forces are driving, and will continue to drive, large incumbent LECs to leave the confines of their respective local service areas and enter as competitive LECs the local service areas of other incumbent LECs. Bell Atlantic's sister BOCs have acknowledged that if they do not aggressively seek to expand their local service areas, they will be handicapped in their efforts to retain their large and mid-size business customers.[28] Industry analysts have recognized that in order to compensate for competitive losses on their home turf, the BOCs and other large incumbent LECs, which lack the strategic alignment they once had, are breaking, and will be forced to continue to break, with tradition and challenge one another as competitive providers of local exchange services. And GTE has confirmed not only that its strategic corporate objectives have

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[28] GTE and Bell Atlantic appear to concur, noting that GTE is "faced with an imperative to compete given its island-like service areas in the other Bells' seas." Application for Transfer of Control at Exh. A (Public Interest Statement), 7.

long included expanding into neighboring markets across the United States, but that it believed that it could "expand *successfully* into neighboring markets across the United States."[29]

In short, GTE and Bell Atlantic are simply wrong that the proposed merger would not "eliminate . . . a likely significant independent competitor in . . . market[s] to provide local exchange and exchange access services, and bundled local exchange, exchange access and long distance services, to residential and smaller business customers" which are currently served by GTE and Bell Atlantic as incumbents.[30] As the Commission has recognized, and Bell Atlantic and GTE concede, the "significance" of a potential competitor is enhanced by a variety of factors, including geographic adjacency of markets, physical proximity of switching, transmission and other equipment and facilities, and "capabilities . . . basic to the operation of a local telephone company" and other "less tangible" capabilities which enhance the entity's competitive potency.[31] Thus, as GTE and Bell Atlantic explain, "economical local entry requires truly proximate facilities (which can be more efficiently used and economically deployed with larger volumes of business) . . . [and] a base of anchor customers and . . . a robust national brand."[32]

Using these criteria, each of GTE and Bell Atlantic are likely significant independent competitors of the other. GTE and Bell Atlantic serve geographically adjacent wireline markets in

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[29] GTE 1996 Annual Report, "Chairman's Message" (emphasis added). In their Application, GTE and Bell Atlantic acknowledge GTE's "demonstrated interest in entering the local markets of the other RBOCs." Id.

[30] Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries (Memorandum Opinion and Order), 12 FCC Rcd. 19985 at ¶ 8.

[31] Id. at ¶¶ 58 - 79.

[32] Application for Transfer of Control at Exh. A (Public Interest Statement), 7.

both Pennsylvania and Virginia and adjacent wireless and wireline markets in multiple locations throughout the nation. Through its local exchange, long distance, wireless and data services, GTE has developed a national brand and a national customer base. And GTE has acknowledged its intent to enter geographically adjacent markets served by BOCs "across the United States." While Bell Atlantic has not announced plans to enter other incumbents' local markets, SBC and Ameritech have confirmed that market forces will compel it to do so soon. And when it does, Bell Atlantic has a base of anchor customers headquartered in such major east coast cities as New York City, Washington, D.C., Boston and Philadelphia, among others,[33] and a brand name known in at least geographically-adjacent GTE markets.

Each of GTE and Bell Atlantic thus fit the description of a potential competitor, as that term would be used in assessing the anti-competitive potential of a corporate merger from an antitrust perspective:

> The outside firm should be found to have been a probable future entrant where it appears to have had the requisite capabilities for de novo entry and where entry appears to have been economically attractive to it.[34]

GTE and Bell Atlantic, however, argue that neither of the two companies alone could "attack the local markets of other Bell companies on a widespread and effective bases," citing primarily financial constraints. TRA submits that this argument rings hollow not only in light of the

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[33] As described by GTE and Bell Atlantic, Bell Atlantic's "business customers from the Northeast provide a legion of anchor customers -- through those business' branch offices -- in many cities across the Nation, including . . . urban areas near current GTE service areas and, in addition, cities currently passed by GTE's planned national long distance network, known as the Global Network Infrastructure or 'GNI'." Id.

[34] Areeda, P. & Turner D. F., Antitrust Law, Vol. 5, p. 117 (Little, Brown and Co., 1980).

admitted compelling business need, but the mammoth sizes of the two combining entities. In 1997, Bell Atlantic reported total assets of nearly $54 billion, operating revenues of more than $30 billion and profits approaching $2.5 billion.[35] According to Bell Atlantic, it invested $5.5 billion last year alone in upgrading and expanding its networks.[36] And Bell Atlantic has experienced three straight years of double-digit growth in earnings and delivered a 46.5 percent total return to its shareholders.[37] GTE's numbers are equally impressive. GTE reported total assets of more than $42 billion in 1997, with operating revenues of more than $23 billion and profits of nearly $3 billion.[38] GTE has averaged annual capital expenditures well in excess of $4 billion over the past five years.[39] And GTE has experienced a five-year annual growth rate in earnings of roughly 17 percent.[40]

Certainly, each of GTE and Bell Atlantic have greater financial wherewithal than most of the competitive LECs with whom they would be competing in local markets outside their franchised territories. Indeed, Bell Atlantic's assets and revenues alone are comparable to those of a combined SBC/Ameritech, thus being adequate, according to SBC and Ameritech, for Bell Atlantic alone to offer on a facilities basis "competitive local exchange, long distance and other telecommunications services to businesses and residences in the 30 largest U.S. local markets

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35 Bell Atlantic 1997 Annual Report, "Selected Financial Data."

36 Id.

37 Id. at p. 3.

38 1997 GTE Annual Report, "Selected Financial Highlights," 18.

39 Id.

40 Id. at "Letter to Shareholders."

outside its incumbent service area."[41] In fact, Bell Atlantic's asset base outstrips all other U.S. telecommunications carriers other than AT&T Corp. ("AT&T"), which has a base only ten percent larger than that of Bell Atlantic.[42]

If a competitive LEC must be capitalized to the extent of nearly $100 billion in order to compete in the local telecommunications market, a fundamental premise underlying the Telecommunications Act is entirely false. There is no role for small, mid-size or even large entities; only behemoths may participate in the market. Monopoly bastions will not be supplanted by competitive markets, but by duopolies and oligopolies in which a few large players divide markets among themselves.

TRA submits, however, that the GTE/Bell Atlantic vision is an erroneous one. While competitive inroads into the local telecommunications market to date have been incremental at best, small and mid-size providers continue to play a significant role. Given the large number of carriers providing local service that are dwarfed by the claimed $100 billion threshold,[43] GTE's and Bell Atlantic's contention that their merger is a necessary prerequisite to expanded local market entry should be lent little credence.

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[41] Application of Ameritech Corporation and SBC Communications, Inc. for Authority to Transfer Control of Ameritech Corporation to SBC Communications, Inc. filed in CC Docket No. 98-141 at Description of the Transaction, Public Interest Showing and Related Demonstrations (July 24, 1998).

[42] Federal Communications Commission, Preliminary Statistics of Communications Common Carriers, 1997 Edition, Table 1.1.

[43] "Number of Large MultiState CLECs Triples Since 1997," Communications Daily (Oct. 8, 1998).

How significant would be the local competition lost as a result of a GTE/Bell Atlantic merger depends on a variety of factors, including, among others, the extent to which market-entry barriers remain in GTE and Bell Atlantic local service areas and the degree to which the combined entity would be better positioned to resist market entry and retain market power. As to the former, neither GTE nor Bell Atlantic has fully complied with the statutory requirements to open its local markets to competition. Bell Atlantic has not yet been able to persuade any state regulatory agency within its 13-state (including Connecticut) region to recommend to the Commission that it should be authorized to provide in-region, interLATA service. And it is becoming more and more evident that Bell Atlantic has not satisfied the conditions imposed on it as a precondition to its acquisition of NYNEX.[44] For its part, GTE is notorious for being the most recalcitrant among the large incumbent LECs in meeting its statutory obligation to open its market to competition.

GTE's performance to date has been impressive with respect to the carrier's nearly unparalleled success in limiting competitive inroads into its markets. For example, GTE, among the largest incumbent LECs represented by GTE and the BOCs, is one of only two carriers that have

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[44] For example, this summer, an administrative law judge with the New York Public Service Commission ("NYPSC") characterized the various methods proposed by Bell Atlantic for recombining unbundled network elements as "unacceptable to support combinations of elements to serve residential and business customers on any scale that could be considered mass market entry." Proceeding on Motion of the Commission to Examine Methods by Which Competitive Local Exchange Carriers Can Obtain and Combine Unbundled Network Elements (Proposed Findings by Administrative Law Judge Eleanor Stein), Case No. 98-C-0690 (NYPSC, Aug. 4, 1998). Other problems are detailed in a complaint recently filed by AT&T with the NYPSC in which Bell Atlantic is faulted for, among other things, (i) failing to meet service delivery deadlines 95 percent of the time, taking three times the allotted time to provision service orders, (ii) failing to commit to service delivery dates more than 85 percent of the time; (iii) consistently failing to provide timely notice of service delivery after order processing; and (iv) deleting a substantial percentage of PIC selections. "AT&T Attacks Bell Atlantic at NY Commission," IAC Newsletter Database (Nov. 6, 1998); "N.Y. Okays Colocation Options, AT&T Alleges Service Delays," Communications Daily (Nov. 6, 1998).

provided competitors with less than 8,000 unbundled loops, GTE last Spring having provided 387, while U S WEST Communications, Inc. ("US WEST") having provided 340.[45] In contrast, Ameritech had provided competitors with nearly 70,000 unbundled loops by that time, while the BOCs/GTE had provided in the aggregate nearly 125,000 unbundled loops to competitors.[46] Among the BOCs and GTE, GTE averages the fewest collocation arrangements per state in which it provides local exchange service as an incumbent and evidences the lowest percentage of lines served by a central office in which competitors have collocated.[47] And based on the number of ported numbers reported, GTE's market share in virtually every market it serves as an incumbent is at or near 100 percent.[48]

Bell Atlantic, while considerably more advanced on the competition continuum then GTE, still confronts precious little competition in the large majority of the markets it serves as the incumbent. Thus, Bell Atlantic touts the 20,000 unbundled loops it has provided and the 21,000 numbers it has ported in Pennsylvania and the 600 local loops it has provided and the 4,000 numbers it has ported in Virginia,[49] none of which values constitutes more than a small fraction of a single

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[45] *See, generally,* local competition survey responses submitted by individual BOCs, GTE and other large incumbent LECs in March, 1998.

[46] Id.

[47] Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, Trends in Telephone Service, 28 - 36 (July, 1998); *see, generally,* local competition survey responses submitted by individual BOCs, GTE and other large incumbent LECs in October, 1998.

[48] GTE's local competition survey responses submitted in March, 1998.

[49] Application for Transfer of Control at Exh. A (Public Interest Statement), 29.

percentage of the access lines provided by Bell Atlantic in those two states.[50] Bell Atlantic has recently reported that "the number of facilities-based competitive lines [in its region] has increased to almost 800 thousand," counting "the number of unbundled loops . . . [at] more than 23 thousand in New York State alone."[51] The former value constitutes less than two percent of the access lines served by Bell Atlantic, while the latter quantity represents a miniscule fraction of a single percent of the access lines provided by the carrier in the State of New York.[52] In short, "[c]ompetition is still in its infancy in the vast majority of local areas;" in most markets, Bell Atlantic's market share, like other "incumbent LECs' market share is or approaches 100 percent."[53]

The loss in each of the areas served by GTE and Bell Atlantic as an incumbent of a likely potential competitor "possess[ed of] competitively significant assets and capabilities that otherwise would enable it to compete [in out-of-region local markets]" obviously is magnified by the continuing refusal of both GTE and Bell Atlantic to fully open their local markets to competition. As the Commission has acknowledged, "[t]he process of lowering barriers to entry is . . . only beginning, not nearing completion," and as a result, "mergers between incumbent monopoly providers and possible rivals during this implementation of the . . . [Telecommunications] Act" must

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[50] Federal Communications Commission, Preliminary Statistics of Communications Common Carriers, 1997 Edition, Table 2.5.

[51] Bell Atlantic Comments filed on October 26, 1998 in CC Docket No. 96-262 at 10.

[52] Federal Communications Commission, Preliminary Statistics of Communications Common Carriers, 1997 Edition, Table 2.5.

[53] Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc. (Memorandum Opinion and Order), CC Docket No. 97-211, FCC 98-225, ¶ 168 (Sept. 14, 1998).

be scrutinized with extraordinary care.[54] Moreover, creating a further need for close scrutiny of a combination of large incumbents, "significant barriers to entry into the local telecommunications marketplace, including interstate exchange access services, will remain" following implementation of the Telecommunications Act."[55] As is apparent, "[b]arriers to entry or expansion are not likely to be sufficiently low that actual or potential competitors can and would expand or enter with sufficient strength, likelihood and timeliness to render unprofitable an attempted exercise of market power resulting from the merger."[56]

Given the continuing failure of GTE and Bell Atlantic to fully open their local markets to competition, the competitive harms that would flow from this proposed merger of major incumbents are multifaceted, bearing in mind that the resulting entity would serve roughly 40 percent of all telephone lines in the nation.[57] On the simplest level, as noted above, a significant source of competition would be lost.[58] This loss, however, involves not merely the loss of a single competitor, but an entity which because of its expertise, experience and financial resources could force the elimination of operational barriers to entry, benefitting in so doing others competitors as

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[54] Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries (Memorandum Opinion and Order), 12 FCC Rcd. 19985 at ¶ 4.

[55] Id. at ¶ 6.

[56] Id. at ¶ 46.

[57] Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, Trends in Telephone Service, p. 98, Table 19.2 (July 1998).

[58] "As a general matter, a monopolist's acquisition of a 'likely' entrant into the market in which monopoly power is held is presumptively anticompetitive." Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries (Memorandum Opinion and Order), 12 FCC Rcd. 19985 at ¶ 139, fn 263 (*citing* Areeda, P. E., & Hovenkamp, H., Antitrust Law, Vol 3., pp. 134 - 136 (rev. ed. 1996)).

well as itself.[59] Who better to identify and facilitate correction of OSS deficiencies and other operational impediments to successful order processing, provisioning, maintenance, repair and billing than an incumbent LEC operating outside its local service area. As the Commission has recognized, "even if a new entrant is able merely to 'shake things up' or 'engender competitive motion,' that alone may make a significant contribution to competition."[60]

Also lost as a result of the dwindling number of large incumbent LECs would be enforcement and ultimately deregulatory opportunities. As the Commission has explained with regard to the former:

> A reduction in the number of separately owned firms engaged in similar businesses will likely reduce this Commission's ability to identify, and therefore to contain, market power. One way that this can happen is by reducing the number of separately owned and operated carriers that can act as "benchmarks" for evaluating the conduct of other carriers or the industry as a whole.[61]

Moreover, as the Commission emphasized, the BOCs themselves have often relied upon the availability of such "benchmarks" as means of detecting anticompetitive abuses in justifying requests for judicial or regulatory relief. As succinctly described by Judge Harold H. Greene more than a decade ago:

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[59] Id. at ¶ 107 (An incumbent LEC "has substantial experience serving mass market customers of local exchange and exchange access services . . . an incumbent LEC entering an out-of-region local market would bring particular expertise to the interconnection negotiation and arbitration process because of its intimate knowledge of local telephone operation. . . . the competitive assets possessed by . . . [an incumbent LEC] are unlikely to be quickly duplicated by smaller market participants.").

[60] Id. at ¶ 139.

[61] Id. at ¶ 147.

> Much is made by the Regional Companies of the circumstance that they are *seven* . . . The Regional Companies . . . argue that now, unlike then, benchmarks exist by which the performance of one of them can be measured against that of the *six others*.[62]

Obviously, the effectiveness of comparative analysis diminishes as the number of points of comparison is decreases.

The Commission has also recognized that the dwindling number of large incumbent LECs "may also hinder and delay the transition to competitive, deregulated telecommunications markets by making it more difficult for the Commission and state regulators to develop and enforce necessary procompetitive rules."[63] Such an impact may arise from omission or commission. As the Commission points out, "[m]ergers between incumbent LECs will likely reduce experimentation and diversity of viewpoints in the process of opening markets," reducing opportunities "to discover solutions to issues and to resolve problems sooner than . . . [they] otherwise would."[64] "Another likely harmful effect of mergers of major incumbent LECs is to increase their ability and incentive to resist the pro-competitive process," lessening incentives for individual incumbents to "break ranks" with other incumbents.[65] While the Commission concluded with respect to the Bell Atlantic/NYNEX merger that alone "the reduction in the number of Bell Companies from six to five

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[62] United States v. Western Electric Co., 673 F. Supp 525, 547 - 48 (D.D.C. 1987), aff'd in part, rev'd in part, 900 F.2d 283 (D.C.Cir. 1990), cert denied sub nom. MCI Communications v. United States, 498 U.S. 911 (1991) (emphasis added).

[63] Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries (Memorandum Opinion and Order), 12 FCC Rcd. 19985 at ¶ 152.

[64] Id. at ¶ 152 - 53.

[65] Id. at ¶ 154.

. . .[did] not sufficiently impair . . . [its] ability to ensure just and reasonable rates, constrain market power, or establish and enforce pro-competitive rules necessary to achieve competition and deregulation" to support a finding that the combination was not in the public interest, relying upon the applicants' assertions that "there will remain '5 RBOCs, GTE, SNET and countless other independents'," approval of all the incumbent LEC mergers currently pending before it would eliminate yet another BOC, as well as GTE, SBC's acquisition of SNET already having been sanctioned.[66]

Against these innumerable competitive harms, GTE and Bell Atlantic essentially assert a single purported public interest benefit -- the increased flexibility and efficiencies sometimes associated with greater size. Because the merged entity will have a larger financial base, it assertedly will be able to compete head to head with incumbents in out-or-region local markets and foreign giants in the global market. Because the merged entity will provide service to a greater number of customers, it will purportedly realize efficiencies of scope and size. Because the merged entity will become one of only a handful of integrated service providers, it will assertedly be better able to satisfy the full range of its customers' telecommunications needs. In other words, bigger is better and what is good for GTE/Bell Atlantic is good for the country.

The Bell System was dismantled for a reason. Bigger can also mean no competitive alternatives. Bigger can mean anticompetitive abuses. Bigger can mean unbridled power. As Judge Greene remarked in describing the break-up of the Bell System:

> The present controversy had its genesis shortly after World War II. At that time the government became concerned about apparent violations of the antitrust laws by the Bell System . . . The monopoly

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[66] Id. at ¶¶ 155 -56.

> of the Bell System in the provision of telephone service, which theretofore had been regarded as a given fact, had come to be questioned in the wake of the discovery that microwaves could be substituted for copper wires for the transmission of long distance telephone conversations. At the same time, the practice of the Bell System's local Operating Companies to satisfy their huge switching and other equipment needs exclusively from AT&T's affiliate Western Electric, rather than to make use also of outside suppliers, began to be challenged by small, efficient manufacturers with special expertise and special products to sell.
>
> Initially, the Bell System brushed off these attempts at competition as bothersome obstacles to its endeavor to provide integrated and efficient telephone service to the American people, but eventually the complaints of the would-be competitors came to be heard by the Federal Communications Commission . . . Thereafter, the FCC struggled with one complaint against the Bell System after another. Although after drawn-out proceedings the Commission was able at times to achieve some small success, it eventually became apparent to everyone, including those in charge of regulation at the Commission, that the FCC, with its relatively small staff and other resources, and its limited authority, would never be able to cope successfully with the Bell System's powerful monopoly position and its ever-changing strategies.[67]

Size thus can bring benefits, but it also can have dangerous consequences. Congress made a judgment in the Telecommunications Act that competition is the means by which the benefits of advances in telecommunications and information technologies and services are to be brought to the American people.[68] Rather than recreate a single unified provider of telephone and information services, Congress adopted "a pro-competitive, deregulatory national policy framework" with the stated intent of "opening all telecommunications markets to competition."[69] Congress did not

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67 United States v. Western Electric Co., 673 F. Supp 525 at 529 - 30.

68 S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996) ("Conference Report").

69 Id.

envision that the product of its herculean legislative effort would be monopoly, duopoly or oligopoly; Congress sought to foster competition. Market entry, not corporate acquisition, was the guiding theme of the Telecommunications Act.

Claims of enhanced efficiencies, increased financial strength and greater scope economies can always be made, if seldom proved, in the context of a proposed merger. TRA submits that whatever may be these benefits, the competitive harms attendant to the continuing combinations of BOCs and other large incumbent LECs far outweigh them. Incumbent LECs can best further the public interest by opening their local markets to competition and vigorously competing with one another in the provision of local and other service offerings. Combinations among BOCs and other large incumbent LECs will increasingly produce large private gains with at best marginal public benefits, offset by significant competitive harms. As the Commission found with respect to the Bell Atlantic/NYNEX merger, GTE and Bell Atlantic simply "have not carried their burden of demonstrating that the proposed merger will create verifiable merger-specific efficiencies that offset the merger's competitive harms."[70]

III. Recommendations

At a minimum, TRA recommends that any grant of the proposed merger of GTE and Bell Atlantic be conditioned upon the commitments extracted from Bell Atlantic and NYNEX as a precondition to approval of their combination. It is not at all clear to TRA, however, that mere acquiescence to these conditions should be sufficient to warrant grant of the authority GTE and Bell

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[70] Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries (Memorandum Opinion and Order), 12 FCC Rcd. 19985 at ¶ 168.

Atlantic seek here. As the Commission has recognized, "[a]s competitive concerns increase, it becomes significantly more difficult for applicants to carry their burden to show that the proposed transaction is in the public interest."[71] In this regard, two factors weigh heavily against approval of the GTE/Bell Atlantic merger.

The first factor is the dwindling number of large incumbent LECs. When the SBC/PacTel combination was sanctioned there were seven BOCs and a significant number of large independent LECs. Now, there are five BOCs with one of the largest independent LECs -- SNET -- having been acquired and another large independent -- GTE -- as well as another BOC -- Ameritech -- having been identified as acquisition targets. The second factor is the passage of time. When the SBC/PacTel and Bell Atlantic/NYNEX mergers were approved, only 18 months had passed without significant competitive inroads into the local exchange market. By the time the Commission acts on the proposed GTE/Bell Atlantic merger, nearly three years will have passed with little new competitive progress to show in the interim.

What then is the answer? At some point the Commission must simply draw the line and refuse to permit any further combinations of large incumbent LECs until such time as these carriers have ceased to be the dominant providers in their respective markets. Given the continuing refusal of incumbent LECs, including GTE and Bell Atlantic, to fully open their respective local markets to competitive entry, that time is probably now. The Commission cannot, and should not, sit idly by as resistant monopolists fortify their monopoly bastions against competitive intrusion.

Short of outright denial, TRA recommends that the Commission up the ante by converting mere post-merger commitments into pre-merger conditions. In other words, let actions

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[71] Id. at ¶ 15.

rather than words be the driving force. Require GTE and Bell Atlantic to implement the various commitments enumerated in Appendices C and D to the *Bell Atlantic/NYNEX Merger Order*, as well as any further conditions imposed here, before permitting them to consummate the proposed transaction.

TRA also recommends that the Commission revisit several conditions it rejected in the *Bell Atlantic/NYNEX Merger Order*. Three matters are of particular importance in this regard. First, identification of "competitive checklist" compliance as a condition to merger approval would further statutory and regulatory aims, requiring GTE and Bell Atlantic to do what they are required by law to do anyway in order to secure a benefit to which they have no entitlement. Obviously, in-region, interLATA authority is has proven to be an inadequate "carrot" for Bell Atlantic, primarily because it, like the other BOCs, believe that they will eventually be granted such authority without full "competitive checklist" compliance if they maintain political pressure at a high enough level. For its part, GTE has no incentives whatsoever to open its markets to competitors. Perhaps the merger "grail" will prove more enticing for Bell Atlantic and sufficient motivation for GTE.

The second matter TRA believes should be revisited involves various reforms necessary to render local competition viable, including the provision of unbundled network element ("UNE") "platforms," as well as UNEs in existing combinations, and collocation reform, encompassing the availability of electronic means of disassembling and recombining UNEs, as well as such variations as "cageless" and "shared" collocation. It has become more and more apparent that these reforms are essential to broad scale local competition. Accordingly, these are the types of conditions that potentially could offset the significant competitive harms associated with a merger among a declining population of large incumbent LECs. While Bell Atlantic is well on its way

toward collocation reform and access to UNE combination, GTE certainly needs prompting in these areas.

Finally, TRA urges the Commission to use the merger as a vehicle to secure greater wholesale discounts. As Bell Atlantic and GTE candidly concede, current "resale margins alone . . . are not large enough to support a sustained out-of-franchise effort."[72] One way to offset the severe competitive damage that would otherwise flow from the proposed merger of Bell Atlantic and GTE, might be to invigorate the local resale market by requiring the merged entity to provide wholesale discounts which allow for sustained entry by small, aggressive competitors.

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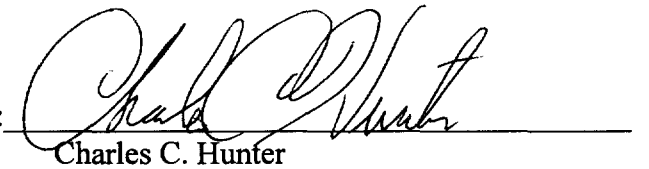
[72] Application for Transfer of Control at Exh. A (Declaration of J. Kissel), 3.

V. Conclusion

By reason of the foregoing, TRA urges the Commission to closely scrutinize the proposed merger of GTE and Bell Atlantic, recognizing that approval of this combination will render it difficult, if not impossible, to reject future mergers, no matter how large the resultant entity. If, however, the Commission sanctions the proposed merger, TRA urges it to impose stringent standards which will at least mitigate the competitive harms that will result from a combination of the largest and the third largest incumbent LECs.

Respectfully submitted,

TELECOMMUNICATIONS RESELLERS ASSOCIATION

By: 

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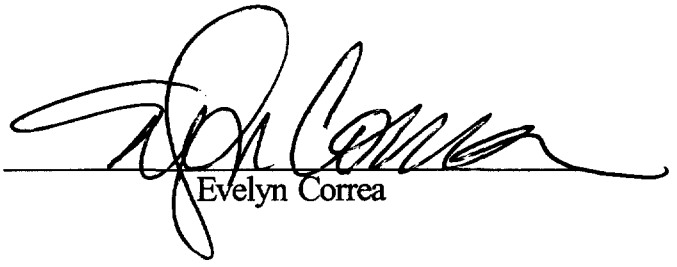
CERTIFICATE OF SERVICE

I, Evelyn Correa, hereby certify that a true and correct copy of the foregoing document has been served by United States First Class Mail, postage prepaid, this 23rd day of November, 1998, on the individuals listed on the attached service list.



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